



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' OF NEW HAMPSHIRE, INC. :
 :
 Petitioner :
 :
 v. :
 :
 STATE OF NEW HAMPSHIRE DEPARTMENT OF :
 CORRECTIONS :
 :
 and :
 COMMISSIONER RONALD L. POWELL :
 :
 and :
 ASSISTANT COMMISSIONER NICHOLAS E. PISHON :
 :

CASE NO. S-0376:2
DECISION NO. 91-54

APPEARANCES

Representing the State Employees' Association of N.H.:

Christopher Henchey, Chief Negotiator

Representing the Department of Corrections, et al:

Michael K. Brown, Esq., Counsel

Also in attendance:

Ronald L. Powell, Commissioner
John V. Amrol, State Employees' Association
Pierre A. Planchet, Correction Officer
Stephen McCormack, Field Rep., S.E.A.

BACKGROUND

The State Employees' Association of N.H., Inc., (SEA) filed unfair labor practice charges against the N.H. Department of Corrections (DOC), Commissioner Powell and Assistant Commissioner Pishon for unilaterally issuing a policy, PPD #1.2.13, Subject: Substance Abuse Testing for Staff Members, effective January 1, 1991 based on the concerns relative to "ability to maintain public and institutional safety. SEA alleged that the seriousness of the violation and because the challenged policy became effective January 1, 1991, a Cease and Desist Order should be issued under PELRB's authority.

Staff Attorney at DOC responded that said policy had been in effect before January 1, 1991 without SEA's objection, that in November, 1990, DOC prepared an amended draft of the existing policy to include "promotional and random" testing and requested constructive feedback from SEA. DOC in this matter made a managerial decision in order to promulgate, inter alia (RSA 622:38 and cross reference RSA 622:5 VIII), the substance abuse testing policy and procedure directive. In addition, managerial rights are exempted from the definition of terms and conditions of employment under RSA 273-A:1, XI.

A Hearing on the request for a Cease and Desist order, pending hearing on the merits of the ULP, was held on February 20, 1991 and Cease and Desist order immediately granted by unanimous vote. Hearing on the merits of the ULP was scheduled and held on May 28, 1991 with all parties represented.

SEA Chief Negotiator Henchey on May 6, 1991 requested PELRB issue an "Order to Comply" in this case for failure to bargain over the issue of substance abuse testing for staff members. The State's Chief Negotiator Manning accepted the blame for not responding to SEA's proposal and stated he would, take corrective action on the issue.

FINDINGS OF FACT

1. Since 1984 the enormous movement against the problem of drug abuse has prompted the introduction of an abundance of drug testing programs for both public and private sector employees at local, state and federal levels.
2. Because of the extent and pervasive nature of the drug problem has prompted employers to justify the implementation of various programs requiring employee testing without reference to any degree of suspicion.
3. The various programs in the public sector have been challenged based on constitutional grounds; unreasonable searches and seizures and guarantee of due process of law. Court decisions in these cases are not uniform.
4. SEA in Sept., 1986 contacted then Governor John H. Sununu regarding their concern over the subject of mandatory drug and alcohol testing and indicated their desire and hope to work towards a mutual solution between SEA and the State.
5. The Governor in answer thanked SEA's Director and stated the administration was looking forward to sit down with SEA and work out a good, working solution and expected the issues would be examined during bargaining.
6. Shortly thereafter the State submitted their proposal 13.19.1 "Health and Safety" and drug and alcohol use subject to management initiative followed by proposal 13.9.2 which added "when the Employer possesses specific and reliable information which demonstrates that an employee's physical or mental abilities are diminished in a manner which adversely affects ordinary job performance or the safety of any personthe Employer may order....." Evidence that SEA and the State negotiated the issue.

7. In November, 1990 SEA notified Commissioner Powell that after the Joint Meeting held to discuss the proposal directive to test employees for possible substance abuse, a meeting of various staff members was held and decision made that the issue is a condition of employment and a subject of bargaining and should such directive be implemented prior to negotiations, SEA would be forced to file unfair labor practice charges against DOC.
8. DOC issued its directive January 1, 1991.

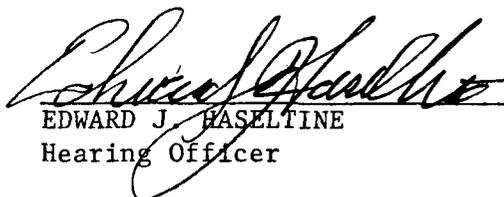
DECISION AND ORDER

After review of testimony and evidence presented at the hearing in addition to RSA 622:38, 622:5, RSA 273-A:1 XI and several court decisions, PELRB rules as follows:

- A. DOC is permitted the testing of employees only upon a showing of reasonable suspicion.
- B. Drug testing is a term and condition of employment and is subject to bargaining under RSA 273-A.
- C. The Cease and Desist Order issued February 20, 1991 is now a final Order.
- D. The parties are ordered to meet for the purpose of negotiations over this issue within ninety (90) days.
- E. Written reports of compliance and progress to be submitted by the parties no later than ninety (90) days.

So Ordered.

Signed this 13th day of August, 1991.


EDWARD J. BASELTINE
Hearing Officer